No. 93-____

Supreme Court, U.S.
FILED

931583 APR - 7 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TEXAS COMMERCE BANCSHARES, INC.,

Petitioner,

—v.—

STANLEY M. GROSSMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD F. ZIEGLER*
DEBORAH M. BUELL
JAMES D. MERRIMAN
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for Petitioner
Texas Commerce Bancshares, Inc.

*Counsel of Record

45 pp

QUESTION PRESENTED

Whether the Court of Appeals has jurisdiction under the collateral order doctrine to review a District Court order reinstating an action that had been dismissed by the District Court on the merits and with prejudice?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Texas Commerce Bancshares, Inc. was defendant-appellant below; Respondent Stanley M. Grossman was plaintiff-appellee.

Pursuant to S. Ct. Rule 29.1, Petitioner provides the following information: The parent corporation of Texas Commerce Bancshares, Inc. is Chemical Banking Corporation; Texas Commerce Bancshares, Inc. has no non-wholly owned subidiaries.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
A. The Dismissed Appeal	2
B. The District Court's Orders Of Dismissal And Reinstatement	4
REASONS FOR GRANTING THE WRIT	
TCB'S PETITION SHOULD BE GRANTED TO CLARIFY THE UNCERTAINTY AND CONFLICT IN THE CIRCUITS ON THE SCOPE OF THE COLLATERAL ORDER DOCTRINE WHERE RIGHTS TO AVOID TRIAL ARE AT ISSUE	7
A. This Petition Should Be Considered With *Desktop*	7

PAGE

B. This Petition Squarely Presents The Issue Of Whether A Reinstatement Order Requiring Trial Is "Effectively Unreviewable" Absent An Immediate Appeal 10

CONCLUSION 16

APPENDICES

Appendix A: Order of the Court of Appeals 1a

Appendix B: District Court Order Granting Motion for Reinstatement 2a

Appendix C: District Court Order Dismissing The Action with Prejudice 5a

TABLE OF AUTHORITIES

Cases PAGE

Abney v. United States, 431 U.S. 651 (1977) 11

Allen v. McCurry, 449 U.S. 90 (1980) 14

American Cyanamid Co. v. McGhee, 317 F.2d 295 (5th Cir. 1963) 13

Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78 (2d Cir. 1993) 6, 12

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) 6, 12

Ceres Partners v. GEL Assocs., 918 F.2d 349 (2d Cir. 1990) 4, 6

Chaput v. Unisys Corp., 964 F.2d 1299 (2d Cir. 1992) 9

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 6

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 14

Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) 14

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 3, 7

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).. 7

Desktop Direct, Inc. v. Digital Equip. Corp., 993 F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (1994) (argued Feb. 22, 1994) 7, 8, 9, 13

Detroit Edison Co. v. Westinghouse Elec. Corp., 88 F.R.D. 671 (E.D. Mich. 1981) 13

Durfee v. Duke, 375 U.S. 106 (1963) 13, 14

PAGE

Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445 (2d Cir. 1978) 12

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981) 14

Forbus v. Sears Roebuck & Co., 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992)..... 8

Grillet v. Sears, Roebuck & Co., 927 F.2d 217 (5th Cir. 1991) 8

Grimes v. Vitalink Communications Corp., 62 U.S.L.W. 2570 (3d Cir. Mar. 9, 1994)..... 14

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 10

Helstoski v. Meanor, 442 U.S. 500 (1979)..... 11

In re Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988)..... 4

Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694 (1982) 14

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991).....4, 5

Janneh v. GAF Corp., 887 F.2d 432, (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990) .....*passim*

Kimmel v. Texas Commerce Bank, 817 F.2d 39 (7th Cir. 1987) 12

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 13

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 111 S. Ct. 2773, *reh'g denied*, 112 S. Ct. 27 (1991).....4, 5

PAGE

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 14

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989) 10

Mitchell v. Forsyth, 472 U.S. 511 (1985) 11, 13

Montana v. United States, 440 U.S. 147 (1979) 13

Nagle v. Lee, 807 F.2d 435 (5th Cir. 1987) 12

Nevada v. United States, 463 U.S. 110 (1983) 12

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 11

Pacific Mut. Life Ins. Co. v. First RepublicBank Corp., 997 F.2d 39 (5th Cir. 1993), *cert. granted sub nom. Morgan Stanley & Co. v.Pacific Mut. Life Ins. Co.*, 114 S. Ct. 680 (1994) 6

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) .. 13

PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983) 12

Puerto Rico Aqueduct & Sewer Auth. v.Metcalf & Eddy, Inc., 113 S. Ct. 684 (1993) 10, 11

Richardson v. Selsky, 5 F.3d 616 (2d Cir. 1993) 13

Richardson-Merrell Inc. v. Koller, 472 U.S. 424 (1985) 10

Towers Hotel Corp. v. Rimmel, 871 F.2d 766 (1989) .. 8

Transtech Indus., Inc. v. A & Z Septic Clean, 5 F.3d 51 (3d Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 16, 1993) (No. 93-960) 8

Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691 (1982) 13, 14

PAGE

United States v. Kellogg (In re West Texas Mktg. Corp.), 12 F.3d 497 (5th Cir. 1994) 13

United States v. MacDonald, 435 U.S. 850 (1978) 10

United States v. Throckmorton, 98 U.S. 61 (1878) 12

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988)..... 11

Welch v. Cadre Capital, 923 F.2d 989 (2d Cir.), *vacated and remanded sub nom. Northwest Sav. Bank, PaSA v. Welch*, 111 S. Ct. 2882 (1991)..... 5

Welch v. Cadre Capital, 946 F.2d 185 (2d Cir. 1991) 5, 6

Statutes and Constitutional Provisions

U.S. Const., Art. IV, § 1..... 13

15 U.S.C. § 78 aa (1989)..... 2

15 U.S.C. § 78 aa-1 (Supp. III 1991) 5

15 U.S.C. § 78 j(b) (1989) 2

28 U.S.C. § 1254(1) (1993) 2

28 U.S.C. § 1291 (1993).....2, 3

28 U.S.C. §§ 1331 (1989)..... 2

28 U.S.C. § 1337 (1989) 2

28 U.S.C. § 1783 (1989) 14

28 U.S.C. § 2283 (1989) 14

17 C.F.R. § 240.10b-5 (1993)..... 2

Fed. R. Civ. P. 8(c)..... 13

Fed. R. Civ. P. 41(a)(1)(i)..... 13

Fed. R. Civ. P. 41(b) 12

PAGE

Fed. R. Civ. P. 58 ..... 6, 12

Fed. R. Civ. P. 60 ..... 14, 15

Other Authorities

18 Charles A. Wright, *et al.*, *Federal Practice and Procedure*, § 4403 (1981) 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-____

TEXAS COMMERCE BANCSHARES, INC.,

Petitioner,

—v.—

STANLEY M. GROSSMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Texas Commerce Bancshares, Inc. ("TCB") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 15, 1994.

OPINIONS BELOW

The order of the Court of Appeals for the Second Circuit (Pet. App. 1a)[1] granting Respondent Stanley M. Grossman's ("Grossman") motion to dismiss TCB's appeal is unreported. The orders of the United States District Court for the Southern District of New York are unreported (Pet. App. 2a, 5a).

[1] "Pet. App." refers to the appendix filed with this petition for a writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case applies 28 U.S.C. § 1291 (1993), which provides in pertinent part:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

A. The Dismissed Appeal

Stanley M. Grossman ("Respondent"), a securities class action lawyer, commenced this securities class action against TCB ("Petitioner") on August 28, 1987 in the United States District Court for the Southern District of New York. Jurisdiction was based on 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. § 78aa. The suit alleged a violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5, based on the assertion that TCB understated its loan loss reserves for about two months in early 1985.

TCB moved to dismiss the action in November 1987 on grounds of improper venue and untimeliness. TCB's motion

was *sub judice* until September 1991, when the District Court granted it and dismissed Grossman's action with prejudice. Pet. App. 2a. Grossman thereafter moved to vacate the dismissal, and in December 1993 the District Court granted Grossman's motion and reinstated the action against TCB that had been dismissed with prejudice 27 months earlier. Pet. App. 5a.

Faced with the burden of a trial in a class action that had been dismissed with prejudice, TCB filed a timely notice of appeal to the Second Circuit on January 20, 1994. TCB asserted that jurisdiction existed under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). On February 23, 1994, Grossman filed a motion to dismiss TCB's appeal on the ground that the Court of Appeals lacked jurisdiction because the District Court's order was not final and did not fit within any exception to § 1291. Grossman conceded that TCB's appeal satisfied two of the three criteria of the collateral order doctrine (the decision of the District Court was final on the issue of reinstatement, and was separate from the merits of the underlying action), but argued that the third criterion—that immediate appeal was necessary to vindicate a right that would otherwise be lost—was not present.

TCB contended that the reinstatement order was wrongly decided and that immediate appeal was necessary to vindicate its right, arising from the *res judicata* effect of the District Court's prior dismissal with prejudice, not to undergo any further litigation on the dismissed claim. TCB further contended that the Second Circuit's decision in *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990), established the immediate appealability of TCB's order. In *Janneh*, the Second Circuit recognized that the trial court's refusal to enforce a disputed, executory settlement contract implicated the defendant's right to not stand trial, and granted immediate review. TCB argued that its claim to immediate review was stronger than that at issue in *Janneh*,

since its right stemmed from an undisputed judicial order, not a private and disputed contract.

On March 15, 1994, the Court of Appeals summarily granted Grossman's motion to dismiss TCB's appeal for lack of jurisdiction. Pet. App. 1a.

B. The District Court's Orders Of Dismissal And Reinstatement

In support of its motion to dismiss in 1987, TCB raised the then-novel argument that a uniform federal limitations period should apply to the class's federal securities claim rather than disparate state statutes of limitations. Anticipating this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), TCB argued that the federal courts should reject the hodge-podge arrangement resulting from their borrowing of state limitations periods. Indeed, TCB's case amply illustrated the inequities of the then-existing rule, since by the time Grossman selected New York as the forum for his claim against TCB, it was already time-barred in Texas, the location of all the events at issue and the only district in which venue was indisputably proper.

After TCB presented its argument to the District Court, the United States Court of Appeals for the Third Circuit became the first court to adopt the uniform one-year/three year uniform federal limitation period.[2] *See In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988). The Second Circuit embraced TCB's argument in 1990 in *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990), and this Court subsequently endorsed that rule in *Lampf, Pleva*, 111 S. Ct. at 2782, and applied the new rule to the parties before it. On the same day that the decision in *Lampf, Pleva* was announced, this Court held in *James B.*

---

[2] After the *Data Access* decision, the parties stipulated that the District Court should adjudicate TCB's limitations period motion and hold TCB's venue motion in abeyance.

Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) ("*Jim Beam*"), that judicial decisions should apply to all pending cases whenever the new rule is applied to the parties in the action in which it is first announced. 111 S. Ct. at 2446.

In light of these decisions, the District Court on September 23, 1991, dismissed Grossman's complaint against TCB with prejudice, holding that the action was time-barred. Pet. App. 4a. At Grossman's request, the District Court included in the dismissal order a provision that effectively provided for expedited appellate review of the dismissal by permitting reinstatement if the Second Circuit rejected application of *Lampf, Pleva* to pending cases in the then-pending appeal of *Welch v. Cadre Capital*, 923 F.2d 989 (2d Cir.), *vacated and remanded sub nom. Northwest Savings Bank, PaSA v. Welch*, 111 S. Ct. 2882 (1991). Pet. App. 3a-4a. The Second Circuit shortly thereafter accepted *Lampf, Pleva*'s application to pending cases, *Welch v. Cadre Capital*, 946 F.2d 185 (2d Cir. 1991), thus rendering TCB's dismissal order unconditional.

Congress thereafter enacted on December 19, 1991, the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236, 2387 (1991). Section 476 of the Act added Section 27A to the Exchange Act, *codified as* 15 U.S.C. § 78aa-1 (Supp. III 1991), for the express purpose of addressing, and partially countermanding, this Court's decisions in *Lampf Pleva* and *Jim Beam*. Section 27A provided, in pertinent part, that Section 10(b) actions that were dismissed as time-barred subsequent to June 19, 1991 but which would have been timely filed "under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such existed on June 19, 1991" could be reinstated on a motion by the plaintiff within 60 days after its enactment. 15 U.S.C. § 78aa-1.

On February 14, 1992, Grossman moved to reinstate the action. TCB objected to the reinstatement arguing that Grossman's claim was untimely under the law in the Second Circuit

on June 19, 1991 (as TCB had contended in its original dismissal motion served in 1987, and in light of the Second Circuit's adoption of the uniform period in 1990), and alternatively because application of Section 27A(b) to TCB's order of dismissal with prejudice would be unconstitutional. The latter issue is now under consideration by this Court in *Pacific Mutual Life Insurance Co. v. First RepublicBank Corp.*, 997 F.2d 39 (5th Cir. 1993), *cert. granted sub nom. Morgan Stanley & Co. v. Pacific Mutual Life Insurance Co.*, 114 S. Ct. 680 (1994). The District Court granted Grossman's motion on December 22, 1993, and ordered the action reinstated. Pet. App. 5a.

TCB's appeal to the Second Circuit, now dismissed for lack of jurisdiction, raised two issues. First, TCB contended that the District Court failed to apply correctly the analysis of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), in concluding that the Second Circuit's uniform limitations period adopted in *Ceres Partners*, 918 F.2d at 364, should not be applied retroactively in TCB's case. Second, TCB's appeal presented the issue of the unconstitutionality of Section 27A(b), the provision that required the lower court to apply *Chevron* to determine whether TCB would be denied its order of dismissal with prejudice some two years after the fact.[3]

---

[3] With respect to the first point, TCB would have argued on its appeal that the District Court erred, *inter alia*, by refusing to consider in the assessment of the equities required by *Chevron* either the inequity to TCB of depriving it of the benefit of the new rule of law to which it had contributed, or the disincentive to litigants to advocate changes in the law created by that refusal. On the second point, TCB's appeal would have noted that the Second Circuit had declined to address the constitutionality of Section 27A(b) in *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993), because the lower court's order in that case was not "final" for constitutional purposes for lack of entry pursuant to Rule 58, Fed. R. Civ. P.; in contrast, the incorporation in TCB's dismissal order of the then-pending appeal in the Second Circuit of *Welch v. Cadre Capital*, 946 F.2d 185 (2d Cir. 1991), rendered TCB's order constitutionally final notwithstanding the absence of a separate judgment under *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978).

REASONS FOR GRANTING THE WRIT

TCB'S PETITION SHOULD BE GRANTED TO CLARIFY THE UNCERTAINTY AND CONFLICT IN THE CIRCUITS ON THE SCOPE OF THE COLLATERAL ORDER DOCTRINE WHERE RIGHTS TO AVOID TRIAL ARE AT ISSUE

A. This Petition Should Be Considered With *Desktop*

This Court has granted a petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Desktop Direct, Inc. v. Digital Equipment Corp.*, 993 F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (1994) (argued Feb. 22, 1994), to resolve an important question concerning the scope of the collateral order doctrine. *Desktop* presents the question of whether a reinstatement order requiring a defendant to proceed to trial notwithstanding a previous settlement agreement and voluntary notice of dismissal is "effectively unreviewable" absent an immediate appeal. This petition presents a very similar issue, but in circumstances in which the prior dismissal arises from the exercise of judicial power, not a mere private contract between the parties.

The collateral order doctrine, enunciated by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), establishes that a non-final order of the district court is subject to immediate review if it satisfies three conditions: it must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Lower courts have differed on whether refusals to enforce settlement agreements are "effectively unreviewable" absent immediate appeal. The Second, Fifth and Eleventh Circuits have held that such orders are immediately appealable. *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert.*

denied, 498 U.S. 865 (1990); *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991); *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 113 S. Ct. 412 (1992); *see also Towers Hotel Corp. v. Rimmel*, 871 F.2d 766 (8th Cir. 1989). The Tenth Circuit in *Desktop* held that they are not. *Desktop Direct, Inc. v. Digital Equipment Corp.*, 993 F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (1994) (argued Feb. 22, 1994); *see also Transtech Ind., Inc. v. A & Z Septic Clean*, 5 F.3d 51, 57-58 (3d Cir. 1993) (criticizing *Janneh*, *Forbus* and *Grillet*), *petition for cert. filed*, 62 U.S.L.W. 3429 (U.S. Dec. 16, 1993) (No. 93-960).

In *Desktop*, the district court vacated a voluntary notice of dismissal with prejudice that had been filed by the plaintiff pursuant to a settlement agreement and rescinded that contract. The defendant immediately appealed, asserting that its contractual right to avoid trial would be irretrievably lost if the reinstatement order were not afforded immediate review. Although the Tenth Circuit dismissed the appeal for lack of jurisdiction, this Court accepted the defendant's petition for certiorari to review the propriety of the Tenth Circuit's application of *Cohen*.

Similar but distinct, TCB's right to immediate review of its reinstatement order also presents the issue of whether its right not to stand trial is "effectively unreviewable" under *Cohen*. Nonetheless, in TCB's case, the issue is presented in the context of a right arising not from private contract, but from the exercise of judicial authority and the principles of *res judicata*. Accordingly, this Court may more fully clarify the applicability of the collateral order doctrine to lower court orders reinstating previously dismissed actions by considering TCB's position in conjunction with its review of the issues in *Desktop*.

Moreover, review of the instant petition is warranted independent of the disposition of *Desktop*. Determination of the issue presented in *Desktop* will not fully resolve the uncer-

tainty as to the application of *Cohen*'s "effectively unreviewable" standard. First, in *Desktop*, there is some question whether the underlying merits of the case are intermixed with the reinstatement order, since factual issues pertinent to the validity of the settlement agreement may also be relevant to the underlying merits of the claim. *Cf. Chaput v. Unisys Corp.*, 964 F.2d 1299, 1302 (2d Cir. 1992) (denial of defendant's defense of release not immediately appealable where material facts concerning validity of release in dispute). Moreover, *Desktop* involves the issue of whether the right in question—a private contract right—is sufficiently important to warrant immediate review under *Cohen*. The Tenth Circuit concluded that *Cohen* applied "[o]nly when there is an explicit constitutional or statutory guarantee or a compelling public policy rationale . . . ." *Desktop*, 993 F.2d at 758.

TCB's petition raises no such issues. It squarely presents for resolution the issue of whether an order reinstating a case which had been dismissed with prejudice implicates a right to avoid trial, thereby triggering an immediate appeal under *Cohen*. In TCB's case, there can be no question that the two issues litigated on Grossman's motion to reinstate—whether the pre-*Lampf* limitations period in the Second Circuit should be applied retroactively to Grossman's action, and whether Section 27A (which compels the application of pre-*Lampf* law) is itself unconstitutional—are wholly unrelated to the merits of Grossman's securities fraud allegation. By the same token, TCB's right to avoid trial is not rooted in a private contract but arises from the *res judicata* effect of an order of the District Court, which after full briefing and argument dismissed Grossman's claims with prejudice and on the merits. As described below, TCB's appeal presents a far more compelling basis for invocation of the collateral order doctrine than does *Desktop*.

B. TCB's Petition Squarely Presents The Issue of Whether A Reinstatement Order Requiring Trial Is "Effectively Unreviewable" Absent An Immediate Appeal

In *Cohen*, this Court held that certain orders, while not finally resolving the entire case, are nonetheless "final" for purposes of Section 1291 because they finally resolve specific important issues separate from the merits. 337 U.S. at 546; *see, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 685 (1993); *Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985). The dismissal of TCB's appeal by the Second Circuit illustrates the need for guidance from this Court on the proper application of *Cohen* and its progeny.

The first two criteria of *Cohen*'s three-part standard—finality of the district court's order and its separateness from the merits of the underlying suit—have posed relatively little conceptual difficulty. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985) (order disqualifying counsel not completely separate from merits); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988) (order denying stay or dismissal of similar federal court proceeding during pendency of state court action not sufficiently final).

Far more challenging has been *Cohen*'s third criterion that the right be "effectively unreviewable" if review is deferred. As this Court has recognized, nearly every pre-trial defense can be characterized in some sense as effectively unreviewable where an appeal occurs only after trial. *See United States v. MacDonald*, 435 U.S. 850, 860 n.7 (1978) ("Admittedly there is value—to all but the most unusual litigant—in triumphing before trial, rather than after it, regardless of the winning claim."); *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (breach of grand jury secrecy does not warrant immediate appeal of trial court's refusal to dismiss indictment; claim that defendant was deprived of right

to litigate without public disclosure is playing "word games" to create right not to be tried); *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 524-25 (1988) ("special care" must be taken to examine nature of the right).

To separate those rights that are effectively unreviewable from those that are not, this Court has looked behind the right to its function: "The critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524 (following *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). Repeatedly this Court has upheld the right to immediate appeal where the right not to face trial is "the heart of the issue." *Mitchell*, 472 U.S. at 525. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) (denial of claim of sovereign immunity immediately appealable); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (denial of claim of absolute immunity immediately appealable); *Helstoski v. Meanor*, 442 U.S. 500 (1979) (denial of claim of immunity under the Speech or Debate Clause immediately appealable); *Abney v. United States*, 431 U.S. 651 (1977) (denial of defense of double jeopardy under Fifth Amendment immediately appealable). In contrast, where the issue is one of the denial of a mere defense to liability before trial, *Cohen*'s requirement of "effective unreviewability" is not satisfied. *See Van Cauwenberghe*, 486 U.S. at 526.

The precedents of this Court support TCB's claim of entitlement to avoid further litigation, and its consequent right to immediate appeal from the denial of that entitlement. Here, just as the defendant in *Abney*, TCB asserts a right which at heart is not only a defense to liability but the right to be free from being "twice vexed" by litigation proceedings themselves. *See* 18 Charles A. Wright, et al., *Federal Practice and Procedure*, § 4403, at 12 n.2 (1981). The District Court's order dismissing this case with prejudice in 1991 grounds TCB's claim for immediate review under the long-recognized doctrine of *res judicata*. A dismissal with prejudice because

the claim is time-barred is a judgment on the merits under Rule 41(b), Fed. R. Civ. P., and entitled to full *res judicata* effect. *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983); *Elfenbein v. Gulf & Western Indus., Inc.*, 590 F.2d 445, 449 (2d Cir. 1978) (per curiam).[4]

Like protection from a second trial under the Double Jeopardy Clause, there can be no doubt that the right of TCB under *res judicata* encompasses a right to avoid the burdens of a trial. As long ago as 1878 this Court described the *res judicata* doctrine as effecting the maxim: "Nemo debet bis vixari pro una et eadam causa"—no one should be twice vexed for one and the same cause. *United States v. Throckmorton*, 98 U.S. 61 (1878) (translation from 18 Wright, et al., *supra*, § 4403, at 12 n.2). More recently, the Court has declared that where a case has come to final judgment, that " 'judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever.' " *Nevada v. United States*, 463 U.S. 110, 130 (1983) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948)) (omitting citation). Thus, where a defendant asserts that a claim is barred by a prior exercise of judicial power, *res judicata* presents a right to avoid a second trial where the claim was dismissed with prejudice in the first, since the doctrine's purpose of " 'reliev[ing] parties of the cost and vexation of multiple lawsuits' " cannot be served if

---

[4] An order of dismissal with prejudice is entitled to full *res judicata* effect even absent a Rule 58, Fed. R. Civ. P., separate judgment. *Kimmel v. Texas Commerce Bank*, 817 F.2d 39 (7th Cir. 1987); *Nagle v. Lee*, 807 F.2d 435, 442 (5th Cir. 1987); *see also Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) ("[N]ot all judgments that are final for purposes of *res judicata* are final for Fifth Amendment and separation of powers purposes."). *See generally Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (quoting *Foman v. Davis*, 371 U.S. 178, 181 (1962)) (" 'It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.' ").

it is viewed exclusively as a mere defense to liability. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). The same principle is evident in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) (doctrine "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation").[5]

There can be little argument that a *res judicata* right warrants the protection of the collateral order doctrine.[6] Application of the doctrines of *res judicata* and collateral estoppel "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979). Indeed, in certain contexts, the principles of *res judicata* are constitutionally mandated. The Full Faith and Credit Clause, U.S. Const., Art. IV, § 1, requires a state to honor a judgment of a sister state to the extent that state would give effect to the judgment. *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 704 (1982); *Durfee v. Duke*, 375 U.S. 106, 109

---

[5] Grossman asserted to the Second Circuit that *res judicata* is exclusively a defense to liability rather than a right to be free of trial, noting that Rule 8(c), Fed. R. Civ. P., requires that it be pleaded as an affirmative defense. This argument proves too much, since Rule 8(c) requires *all* "matter constituting an avoidance or affirmative defense" to be pleaded as such, including immunity defenses which are immediately appealable. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985) (denial of qualified immunity is right not be tried); *Richardson v. Selsky*, 5 F.3d 616, 619 (2d Cir. 1993) (claim of qualified immunity pleaded as affirmative defense).

[6] In *Desktop*, in contrast, the case was dismissed pursuant to a voluntary notice by the plaintiff under Rule 41(a)(1)(i), 993 F.2d at 756, an action involving no exercise of judicial power or involvement by the court whatsoever. *See United States v. Kellogg (In re West Texas Mktg. Corp.)*, 12 F.3d 497, 501 (5th Cir. 1994); *American Cyanamid Co. v. McGhee*, 317 F.2d 295, 297 (5th Cir. 1963); *Detroit Edison Co. v. Westinghouse Elec. Corp.*, 88 F.R.D. 671, 673 (E.D. Mich. 1981).

(1963). Moreover, as a bulwark of federalism, the federal courts are required by 28 U.S.C § 1783 to give equal force to judgments of the various states. *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

In keeping with its importance, this Court has rejected exceptions to *res judicata* principles, even where "the judgment may have been wrong or rested on a legal principle subsequently overruled in another case," *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (citations omitted), or where the court rendering judgment lacked either subject matter or personal jurisdiction. *Underwriters Nat'l Assurance Co.*, 455 U.S. 691 at 706; *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940). Conversely, principles of *res judicata* warrant an exception from the stringent federalism-based protections of the Anti-Injunction Act, 28 U.S.C § 2283 (1989); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). Indeed, *res judicata* mandates that a state court's judgment be given preclusive effect even when to do so bars the federal courts from hearing causes of action over which they have exclusive federal jurisdiction. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985); *Grimes v. Vitalink Communications Corp.*, 62 U.S.L.W. 2570 (3d Cir. Mar. 9, 1994).[7]

The Second Circuit's decision to dismiss TCB's appeal failed to recognize the strength of this judicial foundation for TCB's entitlement to avoid trial in this action. The Court of Appeals also failed to recognize the applicability of its own decision in *Janneh v. GAF*, 887 F.2d 432 (2d Cir. 1989), *cert.*

---

[7] TCB does not suggest that the *res judicata* doctrine precludes courts from vacating or modifying prior dismissal orders under Rule 60, Fed. R. Civ. P. TCB argues only that if a defendant is correct that the reinstatement is erroneous, as is necessarily assumed in analyzing the appealability of the *Cohen* exception, the right not to be "twice vexed" can only be vindicated by immediate review of the reinstatement order.

denied, 498 U.S. 865 (1990). *Janneh*, of course, held that a dispute over a contractual right not to stand trial was "effectively unreviewable" without immediate review, likening it to the double jeopardy right at issue in *Abney*. *Janneh*, 887 F.2d at 435-36. TCB's appeal presents a stronger case for review than either *Janneh* or *Desktop*, since its rights arose from the exercise of judicial power, not merely contract.

In his motion to dismiss TCB's appeal, Grossman argued that endorsement of TCB's position would open the floodgates to immediate appeal of every denial of a motion to dismiss. The argument is misplaced. The crucial question under *Cohen* is whether the appeal implicates the defendant's right to avoid trial. TCB's right arises precisely because the District Court *granted* its motion to dismiss; it did not appeal the denial of such a motion. Hence adoption of TCB's position would not create a slippery slope in which denials of motions to dismiss would become appealable. Indeed, only those Rule 60 orders that implicate the right not to stand trial, such as the reinstatement in TCB's case, would be entitled to immediate review. The Second Circuit's summary dismissal of TCB's appeal illustrates the need for this Court to furnish guidance to the courts of appeals on the applicability of the collateral order doctrine where the right not to stand trial is in question.

CONCLUSION

TCB's right not to stand trial is borne of the exercise of judicial power, and its dismissal with prejudice is entitled to the full force of the protection that *res judicata* affords. Consequently, TCB's petition presents this Court an opportunity to provide needed guidance on the boundaries of the collateral order doctrine as applied to reinstatement orders requiring trial of previously-terminated actions.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: April 6, 1994

Respectfully submitted,

RICHARD F. ZIEGLER*
DEBORAH M. BUELL
JAMES D. MERRIMAN
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006

Attorneys for Petitioner
Texas Commerce Bancshares, Inc.

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 94-7105

STANLEY M. GROSSMAN,

Plaintiff-Appellee,

—against—

TEXAS COMMERCE BANCSHARES, INC.,

Defendant-Appellant.

ORDER

Before: Hon. William H. Timbers, Hon. Joseph M. McLaughlin & Hon. Paul H. Roney CJJ

IT IS HEREBY ORDERED that the motion be and it hereby is Granted and the appeal is dismissed.

George Lange III, Clerk

By:

Edward J. Guardaro, Staff Attorney
Date: 3/15/94

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

87 Civ. 6295 (MJL)

STANLEY M. GROSSMAN,

Plaintiff,

—against—

TEXAS COMMERCE BANCSHARES, INC.,

Defendant.

ORDER OF DISMISSAL

This Court, having given due deliberation to the motion of defendant Texas Commerce Bancshares, Inc. pursuant to Rules 12(b)(1) and 12(b)(6), Fed. R. Civ. P., for dismissal of the Amended Class Action Complaint on the grounds that it was not timely commenced with respect to its claim under the federal securities laws and that this Court lacks subject matter jurisdiction with respect to its claim under state law; and

The motion having been fully briefed by the parties, including with respect to intervening developments in the applicable law, as defendant's motion was first served before any judicial decision had adopted the legal analysis upon which it was based, and counsel for the parties having been heard thereon; and

The Court having addressed with counsel for the parties at a conference on September 13, 1991 the applicability to this

action of the recent decision of the Supreme Court of the United States in *Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773 (1991) ("*Lampf, Pleva*"); and

The Court having concluded that the Supreme Court's decision to apply its ruling in *Lampf, Pleva* to the parties in that case, in conjunction with the authority of the United States Court of Appeals for the Second Circuit in *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 723 (2d Cir. 1990) and *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239, 241 (2d Cir.), *cert. denied*, 469 U.S. 1036 (1984), as well as the Supreme Court's decision in *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439 (1991) ("*James B. Beam*"), each of which addresses the application to pending cases of Supreme Court decisions, compel the application of the limitations period set out in *Lampf, Pleva* to this action without need for inquiry into the specific facts and circumstances of this case; and

The Court having noted that the Supreme Court has vacated and remanded the decision of the Second Circuit in a case entitled *Welch v. Cadre Capital*, No. 90-7419, for further proceedings in light of *Lampf, Pleva* and *James B. Beam*;

NOW, THEREFORE, IT IS HEREBY ORDERED:

That the motion of defendant Texas Commerce Bancshares, Inc. to dismiss the Amended Class Action Complaint as untimely filed is granted in all respects, and the Amended Class Action Complaint is hereby dismissed, with prejudice and without costs, provided only that in the event the United States Court of Appeals for the Second Circuit determines in *Welch v. Cadre Capital*, No. 90-7419, upon remand from the Supreme Court of the United States *sub nom Northwest Savings Bank v. Welch*, ___ U.S. ___, 111 S.Ct. 2882 (1991), that the uniform federal limitations period set out by the Supreme Court in *Lampf, Pleva* does not apply to pending cases in this Circuit except as may be warranted by a fact-specific inquiry in each case, then plaintiff may reinstate this action for such further proceedings as the Court determines

are appropriate by serving written notice for such reinstatement upon counsel for defendant within thirty (30) days of the date of such decision of the Court of Appeals in *Welch v. Cadre Capital*, and filing such notice with this Court.

SO ORDERED.

Dated: New York, New York
September 20, 1991

HONORABLE MARY JOHNSON LOWE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

87 Civ. 6295 (MJL)

STANLEY M. GROSSMAN,

Plaintiff,

—against—

TEXAS COMMERCE BANCSHARES, INC.,

Defendant.

OPINION

APPEARANCES:

KAPLAN & KILSHEIMER
Attorneys for Plaintiff
685 Third Avenue
New York, New York 10017

BY: MARK W. GAFFNEY, ESQ.

CLEARY, GOTTLIEB, STEEN & HAMILTON
Attorneys for Defendant
One Liberty Plaza
New York, New York 10006

BY: RICHARD F. ZIEGLER, ESQ.
JEAN E. KALICKI, ESQ.

MARY JOHNSON LOWE, D.J.

Before this Court is the motion of plaintiff, Stanley M. Grossman, ("Grossman") to reinstate his securities fraud action pursuant to Section 27A of the Securities and

Exchange Act of 1934, *codified as* 15 U.S.C. § 78aa-1 ("Section 27A"). For the reasons set forth below, the motion is granted.

BACKGROUND

Grossman, on behalf of a class of Texas Commerce Bancshares ("TCB") investors, initiated this class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3) on August 28, 1987 against TCB, a bank holding company, alleging violations of § 10(b) of the Securities Exchange Act, Rule 10b-5 of the Code of Federal Regulations and state common law fraud and misrepresentation statutes.

Grossman alleged that TCB made fraudulent assertions concerning its loan loss reserve for the fourth quarter of 1984. Grossman claimed that on January 15, 1985, TCB announced that quarterly earnings for year-end 1984 had again increased. Grossman maintained that he and others relied on this information in purchasing TCB common stock between January 15, 1985 and March 14, 1985. Grossman further asserted that when TCB reported that it had augmented its loan loss reserve for year-end 1984 it knew, or but for a reckless disregard of the truth, should have known that such increase was inadequate to compensate for the risk of loss with respect to certain loans. Grossman alleged that, when TCB announced on March 15, 1985 the need to increase its loan loss reserve (and hence sustained a decline in earnings for the first quarter of 1985), the price of TCB's stock fell sharply.

TCB filed motions to dismiss on grounds of lack of timeliness and improper venue. TCB argued that Grossman's action was barred because a uniform federal limitations period applied and under that limitations period Grossman's action was untimely. On October 29, 1990, while TCB's motions to dismiss were pending, this Court placed the present case on the suspense calendar pending the Second

Circuit's decision in *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2nd Cir. 1990).[1]

In November of 1990, the United States Court of Appeals for the Second Circuit decided *Ceres Partners*, concluding that a uniform federal limitations period for section 10(b) actions of one year from the discovery of the fraud and not more than three years from the fraud was more appropriate than looking to the most analogous state statute of limitations. *Ceres Partners*, 918 F.2d at 360. That court did not, however, address the retroactive application of the new, uniform federal limitations period. *Ceres Partners*, 918 F.2d at 364.

On January 22, 1991 the Second Circuit addressed the issue of whether *Ceres Partners* should be applied retroactively in *Welch v. Cadre Capital*, 923 F.2d 989 (2nd Cir. 1991) ("Welch I") *vacated and remanded, sub nom. Northwest Savings Bank, PaSa v. Welch*, ___ U.S. ___, 111 S.Ct. 2882, 115 L.Ed.2d 1048 (1991). The court in *Welch I* employed the three-part test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) and determined that the uniform federal limitations period of *Ceres Partners* should not be applied retroactively to bar a pending section 10(b) claim in that case.

The present case remained on the suspense calendar pending the Supreme Court's decision in another case addressing the issue of whether a federal limitations period should apply to section 10(b) and Rule 10b-5 claims, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). On June 20, 1991 the Supreme Court decided *Lampf, Pleva* and held that the uniform federal one year/three year limitations period must be applied to actions instituted pursuant to section 10(b) and Rule 10b-5. *Lampf, Pleva* 111 S.Ct. at 2782.

On the same day, the Supreme Court also decided *James Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S.Ct. 2439,

---

[1] *Ceres Partners* addressed the issue of whether courts in the Second Circuit should use the uniform federal limitations period or the most analogous state statute of limitations.

115 L.Ed.2d 481 (1991) ("Jim Beam"). In *Jim Beam*, the Supreme Court held that it is error to refuse to apply retroactively a new rule that has been applied to the parties in the case in which the rule was announced. *Jim Beam*, 111 S.Ct. at 2446. Thus, under the *Lampf, Pleva* and Beam decisions, the uniform federal one year/three year limitations rule was to be applied retroactively to pending section 10(b) and Rule 10b-5 actions.

Thereafter, On September 23, 1991, this Court dismissed plaintiff's action based upon the decisions in *Lampf, Pleva* and *Jim Beam*. However, this Court left open the possibility of reinstatement pending the Second Circuit's decision in *Welch v. Cadre Capital*, 946 F.2d 185 (2nd Cir. 1991) ("Welch II"). This Court provided that Grossman's claim would be reinstated should the Second Circuit find that the uniform federal limitations period established in *Lampf, Pleva* was inapplicable to pending cases in the Second Circuit.

In October of 1991, the Second Circuit, on remand, reconsidered its earlier decision in *Welch I*. In light of *Lampf, Pleva* and *Jim Beam* the court vacated its decision in *Welch II* and held that the uniform federal limitations period did apply to the cases pending in the Second Circuit. As the Second Circuit held that the Supreme Court's decisions in *Lampf, Pleva* and *Jim Beam* applied to cases pending in the Second Circuit, this Court did not reinstate Grossman's claims.

Subsequently, on December 19, 1991, the Federal Deposit Insurance Corporation Improvement Act of 1991 was signed into law. Pub. L. No. 102-242, 105 Stat. 2236. Section 476 of the Act added Section 27A to the Securities and Exchange Act of 1934, *codified as* 15 U.S.C. § 78aa-1, which provided, in pertinent part that § 10(b) actions which were dismissed as time-barred subsequent to June 19, 1991 but which would have been timely filed "under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such existed on June 19, 1991," could be reinstated on a motion by the plaintiff within 60 days after the enactment of § 27A.

On February 14, 1992 Grossman moved this Court to reinstate his suit based on Section 27A.

DISCUSSION

TCB argues that Grossman's motion to reinstate this action should be denied because Section 27A is unconstitutional in that it violates principles of separation of powers, instructs courts how to apply precedent, impermissibly reopens final judgments, therefore disturbing the vested rights in the finality of judicial orders and prescribes a rule of decision in pending cases without altering substantive law.

Recently, in *Axel Johnson Inc v. Arthur Andersen & Co.*, No. 92-7624, slip op. (2nd Cir. September 27, 1993), the Second Circuit Court Of Appeals addressed these very issues and held Section 27A to be constitutional.[2] In *Axel Johnson*, as here, the plaintiff sought reinstatement of his section 10(b) and Rule 10b-5 action which had been dismissed as untimely under the doctrines of *Lampf, Pleva* and *Jim Beam*. The

---

[2] The majority of courts of appeal that have considered the issue have found Section 27A to be constitutional. *See Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, 997 F.2d 39 (5th Cir. 1993), *pet. for cert. filed sub nom., Seidman v. Simmons*, 62 U.S.L.W. 3165 (August 26, 1993), and *First RepublicBank Corp. v. Pacific Mut. Life Ins. Co.*, 62 U.S.L.W. 3321 (October 18, 1993); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993), *pet. for cert. filed*, 62 U.S.L.W. 3299 (October 12, 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 95 (1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *reh'g granted in part*, 977 F.2d 1549 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1842, 123 L.Ed.2d 467 (1993). One court of appeal has held part of Section 27A to be unconstitutional. *See Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (6th Cir. 1993) (declaring subsection (b) of Section 27A to be unconstitutional). The Court further notes, as pointed out by TCB's counsel in a letter dated November 10, 1993, that there is a pending *certiorari* petition before the Supreme Court concerning the constitutionality of Section 27A.

Second Circuit, in light of Section 27A, granted plaintiff's Motion for reinstatement.

In *Axel Johnson*, the defendant challenged Section 27A on the grounds that Section 27A violated the doctrine of separation of powers, directed the courts to apply a rule of decision to a certain class of securities fraud cases, assumed the judicial function of determining the retroactive effect of judicial precedent and infringed upon the vested rights doctrine. Concerning subsection (a), the Second Circuit rejected these contentions and held "[t]hat § 27A(a) constitutes a valid change in the law, rather than an improper act of congressional adjudication." *Axel Johnson*, slip op. at 6336. With respect to subsection (b), the Second Circuit concluded that the judgment in issue was not constitutionally final and thus subsection (b) did not unconstitutionally disturb the finality of judgments. *Axel Johnson*, slip op. at 6345.

In upholding Section 27A as constitutional, the Second Circuit stated: "[§] 27A simply takes a limited class of cases outside the reach of *Lampf*'s construction of § 10(b)/Rule 10b-5, directing application of a separate and distinct statute of limitations rule to those claims." *Axel Johnson*, slip op. at 6340. "Section 27A [does not] entail[ ] legislative adjudication rather [it is] a change in the statute of limitations law of § 10(b)/Rule 10b-5." *Axel Johnson*, slip op. at 6340.

The Second Circuit's determination is consistent with the decisions of courts in this circuit that have confronted the issue of the constitutionality of Section 27A. *See Adler v. Berg Harmon Associates*, 790 F. Supp. 1235 (S.D.N.Y. 1992); *Brown v. Hutton Group*, 795 F. Supp. 1307 (S.D.N.Y. 1992); *In re Crazy Eddie Securities Litigation*, 802 F. Supp. 804 (E.D.N.Y. 1992).

As the Second Circuit's holding that Section 27A is constitutional is binding upon this Court, this Court need only determine which limitations period, including principles of retroactivity, applied to Grossman's claims as of June 19, 1991, one day before the *Lampf*, *Pleva* and the *Jim Beam* decisions. If the uniform federal one year/three year limita-

tions period announced in *Ceres Partners* applies then Grossman's action would not be timely. If, however, the former approach of borrowing the forum's - New York state's— analogous statute of limitations for fraud of six years from accrual or two years from discovery whichever is longer, *Armstrong v. McAlpin*, 699 F.2d 79, 86-87 (2nd Cir. 1983); *IIT, An International Investment Trust v. Cornfeld*, 619 F.2d 909, 928-29 (2nd Cir. 1980) Grossman's suit would be timely.

TCB argues that Grossman's motion should be denied notwithstanding the full effectiveness of Section 27A. TCB contends that *Ceres Partners*, which enunciated the identical rule that the Supreme Court later embraced in *Lampf, Pleva*, was the law in effect on June 19, 1991 and therefore the uniform federal one year/three-year limitations period applies. TCB concludes that under this standard Grossman's action was untimely and dismissal was appropriate.

Section 27A, however, specifies that when determining the applicable limitations period courts must look to the "[L]imitation period provided by the laws applicable in the jurisdiction, *including principles of retroactivity*, as such laws existed on June 19, 1991" 15 U.S.C. 78aa-1(b)(2) (emphasis added). Section 27A expressly orders courts to follow the policy regarding retroactivity before the *Lampf, Pleva* and *Jim Beam* decisions were rendered.[3] Thus, while TCB correctly states that the law in effect on June 19, 1991 in the Second Circuit was the one year/three year period established in *Ceres Partners*, *Henley v. Slone*, 961 F.2d 23 (2nd Cir. 1992); *Gutman v. Equidyne Extractive Industries*, 807 F. Supp. 28

---

[3] Senator Bryan illustrated this when he stated:

> A number of courts had switched . . . to a federalized statute of limitations, but had declined to apply the uniform federalized retroactivity approach because of the unfairness of doing so. In those circuits that had declined to apply the federal statute retroactively, the courts should continue to be obliged to decline to apply the new rule [retroactively]. That is the meaning of the phrase "including principles of retroactivity."

137 Cong. Rec. S. 18624 (daily ed. Nov. 27, 1991).

(S.D.N.Y. 1992); *Morin v. Trupin*, 799 F. Supp. 342 (S.D.N.Y. 1992), TCB neglects to look at the applicable principles of retroactivity. Only if retroactive application of *Ceres Partners* is appropriate will this Court adopt the one-year/three-year limitations period. Otherwise the Court will follow the prior rule of borrowing New York's statute of limitations for fraud.

The reasoning of the Second Circuit in *Welch I* is dispositive of whether retroactive application of *Ceres Partners* is appropriate, as that case determines the applicable principles of retroactivity on June 19, 1991. *Welch I* requires the use of the three-part *Chevron* test on a case-by-case basis to determine retroactivity. *Litton Industries. Inc. v. Lehman Brothers Kuhn Loeb Inc.*, 967 F.2d 742, 752 (2nd Cir. 1992); *Gutman*, 807 F. Supp. at 31 (S.D.N.Y. 1992); *Rabin v. Fivzar Associates*, 801 F. Supp. 1045, 1049 (S.D.N.Y. 1992).

Therefore, in order to determine whether the uniform federal one year/three year applies in the present case this Court must employ the *Chevron* test. *Morin*, 799 F. Supp. at 345 (S.D.N.Y. 1992). *Rabin*, 801 F. Supp. at 1049 (S.D.N.Y. 1992). This Court is aware that the one year/three year rule of *Ceres Partners* should be applied sparingly in light of the retroactivity principles enunciated in *Welch I*; [i]f it would be inequitable under *Welch I* to apply *Ceres Partners* [retroactively] . . . then the more generous limitations period of prior state law applies." *Henley*, 961 F.2d at 26 (2nd Cir. 1992).

Chevron constitutes a narrow exception, in civil actions, to the general presumption favoring application of the law prevailing at the time of appeal. *Welch I*, 923 F.2d at 993 (2nd Cir. 1991). The *Chevron* analysis begins with a threshold inquiry as to pure prospective application of judicial decisions: "[f]irst, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106, (1971) (citations omitted). In this case, it is clear that *Ceres Partners*

established an altogether new standard of law, adopting a uniform federal limitations period and overruling the former borrowing practice by federal courts of the analogous state limitations period upon which Grossman apparently relied. *See Welch I*, 923 F.2d at 994 (2nd Cir. 1991).[4]

If the advocate of non-retroactivity clears the first obstacle, the court must proceed to the balancing test called for by the second and third factors. *Welch I*, 923, F.2d at 994 (quoting *Kremer v. Chemical Construction Corp*, 623 F.2d 786, 789 (2nd Cir. 1980), *aff'd on other grounds*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)). The second factor entails a "[w]eigh[ing] of the merits and demerits in each case by looking to prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Chevron*, 404 U.S. at 106-07 (1971) (citations omitted). In *Welch I*, the Second Circuit stated:

> [t]he one year/three year limitations period advances the remedial and deterrent purposes of the particular cause of action and preserves the defendant's interest in repose by giving notice to potential plaintiffs of the time within which suit must commence and potential defendants of the time beyond which exposure to liability ceases . . . application of a limitations period not yet in existence at the time the suit was commenced clearly does not further either of the competing interests.

Welch I, 923 F.2d at 995 (2nd Cir. 1991). This inquiry favors non-retroactive application of the one year/three year limitations period to Grossman's action. Grossman's suit was brought in August 1987, more than three years prior to *Ceres Partners* and approximately three and one-half years before *Welch I*. The application of the new and shorter one year/three

---

[4] The *Chevron* test does not require a showing of actual reliance on prior law. As the Court in *Welch I* noted, the first prong of *Chevron* requires only that "a plaintiff 'may' have relied on the prior rule and does not create a test of actual reliance." *Welch I*, 923 F.2d at 994 (2nd Cir. 1991).

year limitation period in the present case clearly would not further the effective operation of the rule.

The third *Chevron* factor calls for a weighing of the potential inequitable results imposed by retroactive application for "[w]here a decision of [a court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." *Chevron*, 404 U.S. at 107 (1971) (citations omitted). In the instant case, the equities favor Grossman. TCB makes much of the fact that Grossman did not commence this suit until more than two years had elapsed since Grossman first had reason to believe there might be wrongdoing at TCB. Grossman argues that the delay was an exercise in caution to ascertain whether he had a viable claim. The Second Circuit saw nothing wrong with this length of delay nor does this Court. In *Welch I* the Second Circuit stated: "[W]e see no reason in this case to fault them for taking most of the then applicable two-year period after discovery of alleged fraud to determine whether they had grounds for suit." *Welch I*, 923 F.2d at 995 (2nd Cir. 1991). In examining TCB's allegations, this Court notes that the type of argument advanced by TCB has been rejected by another court as well. *Rabin*, 801 F. Supp. at 1050 n.5 (S.D.N.Y. 1992). Mere delay and mere accusations of forum shopping, without more, are inconsequential. It is difficult to determine whether there has been any procedural maneuvering on the part of Grossman of the type referred to in *Welch I*, 923 F.2d at 995 (2nd Cir. 1991).

The majority of courts in this district have refused to apply the one year/three year limitations period retroactively, finding that to do so would be improper. *See Ahmed v. Trupin*, 1992 U.S. Dist. LEXIS 207 (S.D.N.Y. 1992); *Ades v. Deloitte & Touche*, 1992 U.S. Dist. LEXIS 12 (S.D.N.Y. 1992); *Department of Economic Development v. Arthur Anderson & Co.*, 1992 U.S. Dist. LEXIS 4586 (S.D.N.Y. 1992); *Alfadda v. Fenn* 1992 U.S. Dist. LEXIS 1958 (S.D.N.Y. 1992). In those cases, also commenced before *Ceres Partners* was decided,

the court decided that retroactivity was inappropriate and applied the analogous state law limitations period before *Ceres Partners*. *See also Morin*, 799 F. Supp. at 346-47 (S.D.N.Y. 1992) (using *Chevron* test and applying pre-*Ceres Partners* law to § 10(b) claims filed on or before date *Ceres Partners* decision was rendered). The courts in the above cases, based upon the *Chevron* case-by-case analysis, found in those particular circumstances that retroactive application would not be appropriate and concluded that pre-*Ceres Partners* law was applicable. The underlying rationale is also applicable here and thus *Ceres Partners* should not be applied retroactively.

To deny Grossman "his right to a day in court" now after six years have passed and TCB has not yet answered would be a "substantial inequitable result." *Chevron*, 404 U.S. at 107 (1971). This is especially true where, as here, Grossman " '[S]lept on his rights' at a time when he could not have known the time limitation that the law imposed upon him." *Chevron*, 404 U.S. at 107 (1971) (citation omitted).

TCB argues that applying *Ceres Partners* retroactively would not be inequitable. TCB, pointing to *In re Chaus Securities Litigation*, 801 F. Supp. 1257 (S.D.N.Y. 1992) and *Spier v. Erber*, No. 89 Civ. 1657, 1992 WL 230254 (S.D.N.Y Sept. 1, 1992) argues that courts in this District have applied *Ceres Partners* retroactively and dismissed with prejudice securities claims that were untimely under the *Ceres Partners* rule. These cases, however, are easily distinguished. In *Chaus*, the court noted that the retroactive application of *Ceres* does not produce substantial inequitable results when the statute of limitations is unchanged by retroactive application. The *Chaus* court stated that the uniform one year/three year statute of limitations would apply regardless of whether *Ceres Partners* applied retroactively. Thus retroactive application of *Ceres Partners* would not produce substantial inequities in that case. *Chaus* 801 F. Supp. 1257, 1270. In *Spier*, the plaintiffs had not provided the court with any reason to believe that the equities favored them or that weighing

the Chevron factors favored non-retroactive application of the one year/three year rule. The plaintiffs filed no papers whatsoever in opposition to the motions with respect to the securities law claim and the court noted that under Local Civil Rule 3(b), plaintiffs' failure to oppose the motions constituted sufficient cause for granting the motions by default.

TCB also contends that failure to apply *Ceres Partners*' one year/three year rule retroactively in this case would hinder judicial economy. TCB argues that litigants will be deprived of the incentive to argue in favor of changes in the law because litigants would be put on notice that they could not benefit from their arguments unless they prevailed on the merits and "won a race to the courthouse" to ensure that their action was the one in which the new rule was announced. This Court sees no merit in TCB's argument. Section 27A applies only to a small group of cases. Future litigants will not be subject to the rule's principles of non-retroactivity and thus there would be no need for a "race to the courthouse" for a litigant to benefit from a new rule.

This Court recognizes the benefits in endorsing a rule of pure retroactivity. The arguments favoring retroactivity are not lost upon this Court. However, the Supreme Court's decision in *Chevron* has permitted certain narrow exceptions to the general rule. While the Supreme Court's subsequent decision in *Jim Beam* held that once a new rule of law is announced and applied to the litigants in a particular case, the courts thereafter must apply the rule retroactively in all pending cases, *Jim Beam*, 111 S.Ct. at 2448, Congress has carved out an exception and this Court cannot contravene Congress' mandate.

Under these circumstances the Court concludes, based on the *Chevron* analysis, that retroactive application of the one year/three year statute of limitations is not warranted. Noting the principles of retroactivity and their purpose, significantly the purpose behind the one year/three year rule of *Ceres Partners*, this Court finds it inequitable to charge Grossman

with a statute of limitations period not even in existence until some three years after the start of his action.

Applying New York's analogous statute of limitations for fraud, six years from accrual or two years from discovery whichever is longer, to this case the Court finds that Grossman's action must be reinstated as timely under the laws applicable in the jurisdiction. Grossman alleges that the fraud occurred during the period between January 15, 1985 when TCB announced that its quarterly earnings had again increased during the fourth quarter of 1984 and March 13, 1985 when TCB reported its quarterly financial information to the Securities and Exchange Commission ("SEC"). At his deposition taken by TCB's counsel on January 29, 1988, Grossman said that he first learned of the SEC investigation "around June or so of '85." Deposition of Stanley M. Grossman at 142 (Exhibit B of Ziegler Declaration). Again, during his deposition Grossman stated that he first considered bringing the lawsuit in "March of 1985." Grossman Deposition at 139 (Exhibit B of Ziegler Declaration). Grossman's action being brought approximately two and one-half years after the occurrence of the alleged deceit, it satisfies the six year branch of New York's statute of limitation for fraud. Having done so, Grossman's action was timely and is thus reinstated.

TCB also argues that Grossman's suit should not be reinstated because of improper venue and failure to state a claim under § 10(b). As these issues are not presently before this Court and as both parties have not yet adequately briefed these issues, the Court will not decide these issues at this time.

CONCLUSION

For the foregoing reasons, Grossman's motion to reinstate his action is granted.

It is SO ORDERED.

Dated: New York, New York
December 22, 1993

United States District Judge

Copies of this Order to:

KAPLAN & KILSHEIMER
Mark W. Gaffney, Esq.
685 Third Avenue
New York, New York 10017

CLEARY, GOTTLIEB, STEEN & HAMILTON
Richard F. Ziegler, Esq. and Jean E. Kalicki, Esq.
One Liberty Plaza
New York, New York 10006

Supreme Court, U.S.
FILED
MAY - 6 1994
OFFICE OF THE CLERK

No. 93-1583

In The

Supreme Court of the United States

October Term, 1993

TEXAS COMMERCE BANCSHARES, INC.,

Petitioner,

vs.

STANLEY M. GROSSMAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GREGORY K. ARENSON
Counsel of Record
WENDY M. ZELLER
KAPLAN, KILSHEIMER & FOX
Attorneys for Respondent
685 Third Avenue
New York, New York 10017
(212) 687-1980

5174
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Did the court of appeals have jurisdiction under the collateral order doctrine over an appeal from an interlocutory district court decision reinstating under section 27A of the Securities Exchange Act a conditionally dismissed securities class action after determining it had been timely commenced within the applicable limitations period?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	iii
Statutory Provisions Involved	1
Statement of the Case	2
A. Plaintiff Commences This Action In August 1987 After The SEC Found TCB Had Violated § 13(a).	3
B. TCB Delays Its Day Of Reckoning.	3
C. The Limitations Period Applicable To § 10(b) Actions Is Significantly Changed.	4
D. The District Court Enters An Order Conditionally Dismissing This Case.	5
E. Congress Enacts § 27A And Plaintiff Seeks Reinstatement.	5
F. The District Court Reinstates This Action.	7
G. The Court Of Appeals Dismisses TCB's Attempted Appeal.	7
Summary of the Argument	8

Contents

	Page
Reasons for Denying the Writ	9
The Collateral Order Doctrine Does Not Permit TCB's Appeal From The District Court's Determination.	9
A. The District's Court's Determination Of The Constitutionality Of § 27A And Of The Applicable Limitations Period May Be Reviewed After Final Judgment.	9
B. TCB Is "Playing Word Games" In Attempting To Contrive A Right Justifying An Interlocutory Appeal.	11
Conclusion	15

TABLE OF CITATIONS

Cases Cited:

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) 2

Axel Johnson, Inc. v. Arthur Andersen & Co., 6 F.3d 78 (2d Cir. 1993) 5, 6, 7, 8

Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) 5

Blonder-Tongue Lab., Inc. v. Univ. of Illinois Found., 402 US. 313 (1971) 12

Contents

Page

Board of Regents of Univ. of State of New York v. Tomanio, 446 U.S. 478 (1980) 8, 10, 12, 13

Ceres Partners v. GEL Associates, 918 F.2d 349 (2d Cir. 1990) 4, 7

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 4, 7

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 7

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 9, 10, 11

In re Data Access Sys. Sec. Litig., 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988) 4

DeWeerth v. Baldinger, 836 F.2d 103 (2d Cir. 1987) 8, 10

Desktop Direct, Inc. v. Digital Equip. Corp., 993 F.2d 755 (10th Cir.), *cert. granted*, 114 S. Ct. 379 (1993) 11, 13

Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991) 10

Gray v. First Winthrop Corp., 989 F.2d 1564 (9th Cir. 1993) 8

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 10

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S. Ct. 2439 (1991) 4, 5, 10

Contents

	Page
Janneh v. GAF, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990)	13
Johann Maria Farina Gegenuber dem Neumarkt v. Roger & Gallet, 296 F.2d 119 (2d Cir. 1961)	5
Koester v. American Republic Inv., Inc., 11 F.3d 818 (8th Cir. 1993)	8, 10
Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 111 S. Ct. 2773 (1991)	4, 5
McDonald v. City of West Branch, Michigan, 466 U.S. 284 (1984)	12
Micromedia v. Automated Broadcast Controls, 799 F.2d 230 (5th Cir. 1986)	10, 13
Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989)	8, 9, 11
Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75 (1984)	12
Mitchell v. Forsyth, 472 U.S. 511 (1985)	14
Pacific Mut. Life Ins. Co. v. First Republic Bank Corp., 997 F.2d 39 (5th Cir.), *cert. granted sub nom. Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.*, 114 S. Ct. 680 (1993)	5, 9

Contents

Page

San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987) 10

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 14

Welch v. Cadre Capital, 923 F.2d 989 (2d Cir.), *vacated and remanded sub nom. Northwest Sav. Bank PaSA v. Welch*, 501 U.S. __, 111 S. Ct. 2882, *opinion after remand*, 946 F.2d 185 (2d Cir. 1991) 4, 5, 7

Woods v. Rhodes, 994 F.2d 494 (5th Cir. 1993) 10, 13

Statutes Cited:

Securities Exchange Act § 10(b), 15 U.S.C. § 78j(b)(1988) 1, 2, 3, 4, 5, 6, 8, 11

Securities Exchange Act § 13(a), 15 U.S.C. § 78m(a)(1988) 2, 3

Securities Exchange Act § 27A, 15 U.S.C. § 78aa-1 (Supp. III 1991) .....i, 1, 5, 6, 7, 8, 9, 10, 11, 13

28 U.S.C. § 1291 (Supp. IV 1992) 1, 2

28 U.S.C. § 1292(b) 8

28 U.S.C. § 1292(c) 2

28 U.S.C. § 1292(d) 2

28 U.S.C. § 1295 2

Contents

Page

42 U.S.C. § 1983 ..... 8, 12, 13

United States Constitution Cited:

First Amendment 10

Fifth Amendment 6

Fourteenth Amendment 10

Rules and Regulations Cited:

17 C.F.R. § 240.10b-5 (1993) 2

Fed. R. Civ. P. 8(c) 11, 12

Treatises Cited:

Restatement (Second) of Judgments (1982) 12, 13

18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981) 12

STATUTORY PROVISIONS INVOLVED

Securities Exchange Act section 27A, Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991), codified at 15 U.S.C. § 78aa-1 (Supp. III 1991), provides:

> (a) Effect on pending causes of action
>
> The limitation period for any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on dismissed causes of action
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

The entire text of 28 U.S.C. § 1291 (Supp. IV 1992) is:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Following the release by the Securities and Exchange Commission (the "SEC") on August 17, 1987 of an opinion and order finding that petitioner Texas Commerce Bancshares, Inc. ("TCB") had violated section 13(a) of the Securities Exchange Act[1] by materially understating its loan loss reserve during the first quarter of 1985, respondent commenced this securities class action asserting violations of section 10(b) of the Securities Exchange Act,[2] and rule 10b-5 promulgated thereunder.[3] Taking advantage of doctrinal developments regarding the appropriate limitations period to apply to § 10(b) actions, foreshadowed by this Court's *Malley-Duff* opinion in June 1987,[4] petitioner has delayed for

---

1. 15 U.S.C. § 78m(a) (1988).

2. 15 U.S.C. § 78j(b) (1988).

3. 17 C.F.R. § 240.10b-5 (1993).

4. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987).

almost seven years, and by this petition seeks to delay further, substantive consideration and determination of this securities class action. TCB's petition raises no special or important issue worthy of this Court's review and seeks merely to prolong consideration of what would be a meritless interlocutory appeal.

A. Plaintiff Commences This Action In August 1987 After The SEC Found TCB Had Violated § 13(a).

As the district court found, plaintiff considered bringing this action in 1985 when the possibility that TCB had misrepresented its financial condition was first disclosed. (Pet. App.[5] 17a.) However, plaintiff, in an exercise of caution and relying on the then-existing six-year limitations period applied to § 10(b) securities actions commenced in New York (Pet. App. 13a, 14a, 17a), did not file his complaint until shortly after the SEC issued its August 1987 opinion and order. In its opinion and order, the SEC found that TCB had violated Securities Exchange Act § 13(a) by filing a report on Form 10-K for the period ending December 31, 1984, "which contained financial statements which materially understated the ALLL [the allowance for loan and lease losses] by $28.2 million and overstated the earnings and Net Income Before [Taxes by 12%] and After Taxes [by 8%] for the year." The SEC did not obtain evidence of *scienter,* because that is not a requirement to show a violation of § 13(a).

B. TCB Delays Its Day Of Reckoning.

TCB's response to the complaint was to file motions to dismiss for untimeliness and improper venue. Plaintiff moved for certification of the class. Discovery was taken confined to the

---

5. "Pet. App." refers to the appendix filed with TCB's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit ("TCB's Petition").

issues on these motions, and, following the Third Circuit's decision in *In re Data Access Sys. Sec. Litig.*,[6] the parties and the district court restricted the initial motion practice (heard in late 1988) to the limitations issue. The district court reserved decision and then placed the case on its suspense calendar while awaiting doctrinal developments.

C. The Limitations Period Applicable To § 10(b) Actions Is Significantly Changed.

On November 8, 1990, the Court of Appeals for the Second Circuit in *Ceres Partners v. GELAssociates*[7] determined that there should be a uniform limitations period for § 10(b) actions requiring suit to be filed within one year from the date of discovery and not more than three years from accrual of the claim. However, on April 30, 1991, in *Welch v. Cadre Capital*,[8] the Second Circuit held that the new *Ceres Partners* limitations period would not be applied retroactively under this Court's standards established in *Chevron Oil Co. v. Huson*.[9] This Court on June 20, 1991, then decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*[10] and *James B. Beam Distilling Co. v. Georgia*.[11] *Lampf Pleva* adopted the one-year/three-year uniform limitations period for § 10(b)

---

6. 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988).

7. 918 F.2d 349, 352-53 (2d Cir. 1990).

8. 923 F.2d 989, 995 (2d Cir.) ("*Welch I*"), *vacated and remanded sub nom. Northwest Sav. Bank PaSA v. Welch*, 501 U.S. __, 111 S. Ct. 2882, *opinion after remand*, 946 F.2d 185 (2d Cir. 1991).

9. 404 U.S. 97, 106-107 (1971).

10. 501 U.S. 350, __, 111 S. Ct. 2773, 2781 (1991).

11. 501 U.S. 529, __, 111 S. Ct. 2439, 2448 (1991).

actions, and *James Beam* held that new rules announced by this Court should be applied to all pending cases. In addition, this Court remanded *Welch* to the Second Circuit for reconsideration in light of its decisions in *Lampf Pleva* and *James Beam.*[12]

D. The District Court Enters An Order Conditionally Dismissing This Case.

On September 20, 1991, the district court signed an order (Pet. App. 2a-4a) conditionally dismissing this action, pending the outcome of the remand of *Welch.* However, as conceded by TCB's Petition at 6 in n. 3, no judgment or final order was ever entered! Therefore, under long-standing Second Circuit law,[13] this conditional order was not appealable.[14]

E. Congress Enacts § 27A And Plaintiff Seeks Reinstatement.

On December 19, 1991, Congress enacted Securities Exchange Act § 27A. In pertinent part, § 27A provides that implied

---

12. 501 U.S. __, 111 S. Ct. 2882 (1991).

13. *Johann Maria Farina Gegenuber dem Neumarkt v. Roger & Gallet,* 296 F.2d 119 (2d Cir. 1961) (Friendly, Marshall and Clark, CJJ. *per curiam*) (appeal dismissed as premature from conditional order where no final judgment was entered); *cf. Bankers Trust Co. v. Mallis,* 435 U.S. 381, 382 (1978) (appeal permitted from unconditional final order where parties and court proceeded on the assumption that there was an adjudication of dismissal), relied on in TCB's Petition at 6, n. 3, and 12, n. 4.

14. The unappealability of the conditional September 20 order places this case on all fours with *Axel Johnson Inc. v. Arthur Andersen & Co.,* 6 F.3d 78, 84 (2d Cir. 1993), and creates a crucial distinction with *Pacific Mut. Life Ins. Co. v. First Republic Bank Corp.,* 997 F.2d 39, 46 (5th Cir.), *cert. granted sub nom. Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.,* 114 S. Ct. 680 (1993) ("[e]ach of the defendants in these cases . . . possessed final, nonappealable judgments dismissing the plaintiffs' § 10(b) claims").

actions under § 10(b) — which had been dismissed as time-barred after June 19, 1991 (such as this action), but which would have been considered timely filed "under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such existed on June 19, 1991" — could be reinstated on a motion filed within 60 days. Plaintiff filed such a motion on February 14, 1992.

TCB opposed the motion, arguing, among other things, that § 27A was unconstitutional. The district court again delayed decision until the issue was clarified by the Second Circuit. On September 27, 1993, the Second Circuit decided *Axel Johnson, Inc. v. Arthur Andersen & Co.*[15] The Second Circuit upheld the constitutionality of § 27A(a) in the face of a "separation of powers" challenge,[16] and rejected a "vested rights" challenge to section 27A(b) because, as here, the time for appeal of the district court's decision, there denominated an order, had not begun to run.[17] The Second Circuit reasoned:

> [N]ot all judgments that are final for purposes of *res judicata* are final for Fifth Amendment and separation of powers purposes. Rather, a case remains "pending," and open to legislative alteration, so long as an appeal is pending or the time for filing an appeal has yet to lapse.[18]

---

15. 6 F.3d 78 (2d Cir. 1993).

16. 6 F.3d at 81-83.

17. 6 F.3d at 83-84.

18. 6 F.3d at 84 (citations omitted). *Cf.* TCB's Petition at 12, n. 4.

F. The District Court Reinstates This Action.

After the Second Circuit's decision in *Axel Johnson*, the district court on December 22, 1993 issued its opinion and order reinstating this action. The court followed the Second Circuit's determination on the constitutionality of § 27A (Pet. App. 9a-10a) and then applied Second Circuit limitations and retroactivity principles as they existed on June 19, 1991, which had been stated in *Welch I* (Pet. App. 10a-12a). In particular, the district court found that (i) *Ceres Partners* had established a new principle of law (Pet. App. 12a-13a), (ii) retrospective application of *Ceres Partners* would not further the effective operation of the new rule it stated (Pet. App. 13a-14a), and (iii) the specific equities in this case weighed in favor of permitting plaintiff to proceed (Pet. App. 14a-17a).[19]

G. The Court Of Appeals Dismisses TCB's Attempted Appeal.

Pursuing its strategy of delay, TCB sought to appeal under the collateral order doctrine, first enunciated in *Cohen v. Beneficial Indus. Loan Corp.*,[20] the district court's interlocutory determination reinstating this conditionally dismissed action. On respondent's motion, the court of appeals summarily dismissed the attempted appeal (Pet. App. 1a). TCB now seeks certiorari from this Court.

---

19. TCB's Petition is significantly inaccurate at 6, n. 3, where it claims that the district court did not weigh the equities as required by *Chevron Oil Co. v. Huson*, 404 U.S. 97, 107 (1971), and, in particular, did not consider whatever equities there were in TCB's favor from its purportedly having contributed to the development of a new rule of law (*see* Pet. App. 16a where the district court rejected this very argument).

20. 337 U.S. 541, 546-47 (1949).

SUMMARY OF THE ARGUMENT

There is no special and important issue presented by petitioner.

• Section 27A affects only a limited number of cases, *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 82 (2d Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1572 (9th Cir. 1993), and the number of those cases must diminish as the last date to reinstate a case under § 27A — February 17, 1992 — recedes.

• There is no conflict among the circuits, as there is no reported decision on the applicability of the collateral order doctrine to an interlocutory decision reinstating a § 10(b) action under § 27A.[21]

• The collateral order doctrine is inapplicable. Section 27A only modified a limitations period; it does not contain "an explicit statutory or constitutional guarantee that trial will not occur," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989). The validity of TCB's limitations defense to this action may be reviewed on appeal from any final judgment in favor of respondent. *See Board of Regents of Univ. of State of New York v. Tomanio*, 446 U.S. 478, 482-83 (1980) (upholding a limitations defense to reverse a judgment for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Koester v. American Republic Inv., Inc.*, 11 F.3d 818, 820 (8th Cir. 1993) (reversing a judgment on a verdict against one defendant because the breach of fiduciary duty claim was time-barred); *DeWeerth v. Baldinger*, 836 F.2d 103, 104 (2d Cir. 1987) (reversing a judgment directing recovery of a stolen painting because the claim was time-barred).

---

21. For example, the appeal in *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993), was certified under 28 U.S.C. § 1292(b), and the three appeals in *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1567 (9th Cir. 1993), were all from final judgments.

REASONS FOR DENYING THE WRIT

THE COLLATERAL ORDER DOCTRINE DOES NOT PERMIT TCB'S APPEAL FROM THE DISTRICT COURT'S DETERMINATION.

To come within the "narrow exception to the normal application of the final judgment rule [that] has come to be known as the collateral order doctrine," *Midland Asphalt, supra*, 489 U.S. at 798, an "order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). The third condition cannot be met by petitioner.[22]

A. The District's Court's Determination Of The Constitutionality Of § 27A And Of The Applicable Limitations Period May Be Reviewed After Final Judgment.

The district court's opinion and order that TCB seeks to appeal decided two issues — (1) the constitutionality of § 27A and (2) the appropriate limitations period to be applied to this action. Neither issue can possibly justify an interlocutory appeal.

If this Court in the pending *Morgan Stanley* case[23] should

---

22. Contrary to TCB's Petition at 3, respondent did not concede in the court of appeals that TCB had satisfied the first two conditions of the collateral order doctrine. Respondent noted that the court of appeals need not have addressed those conditions because the third condition was dispositive, but respondent also presented arguments relating to the first two conditions.

23. *Pacific Mut. Life Ins. Co. v. First Republic Bank Corp.*, 997 F.2d 39, 46 (5th Cir.), *cert. granted sub nom. Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.*, 114 S. Ct. 680 (1993).

determine that § 27A(a) is unconstitutional, then surely the district court, following *James Beam, supra*, will apply the new law.[24] If this Court should uphold the constitutionality of § 27A, then surely TCB would be well advised not to pursue a then frivolous appeal of this issue. In either event, the constitutionality of § 27A may be raised by TCB on any appeal from a final judgment in favor of plaintiff. *See, e.g., Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (plaintiff's Equal Protection challenge to jury selection reviewed on appeal from a final judgment for defendant); *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987) (defendant's First Amendment challenge to statute reviewed on appeal from final judgment for plaintiff).

Similarly, the issue of the appropriate limitations period applicable to this specific action is reviewable on appeal from a final judgment, *Board of Regents of Univ. of State of New York v. Tomanio*, 446 U.S. 478, 482-83 (1980); *Koester v. American Republic Inv., Inc.*, 11 F.3d 818, 820 (8th Cir. 1993); *DeWeerth v. Baldinger*, 836 F.2d 103, 104 (2d Cir. 1987), as would be any other defense that fails during the course of an action, *Woods v. Rhodes*, 994 F.2d 494, 496 (5th Cir. 1993) (defense of release); *Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 231 (5th Cir. 1986) (statute of frauds defense).[25]

---

24. To this extent, the district court did not conclusively determine the disputed question, and the first *Coopers & Lybrand* condition has not been met. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988) (order denying stay during pendency of state court action "inherently tentative"); *cf. id.*, at 291 (Scalia, J., concurring: "A categorical order *otherwise qualifying* for *Cohen* treatment does not necessarily lose that status, and become 'nonfinal,' merely because the court may contemplate — or even, for that matter, invite — renewal of the aggrieved party's request for relief at a later date" [emphasis added]).

25. A limitations defense, as any other affirmative defense that must be (Cont'd)

B. TCB Is "Playing Word Games" In Attempting To Contrive A Right Justifying An Interlocutory Appeal.

Nowhere in the district court opinion is there a determination of TCB's "right not to undergo any further litigation" (TCB's Petition at 3) or "right not to stand trial" (TCB's Petition at 8) or "right to avoid trial" (TCB's Petition at 9),[26] because no such right was ever in issue or adjudicated. Nowhere is such a right granted in § 27A, which only speaks about "limitation periods" and "principles of retroactivity" in regard to § 10(b) actions. The inescapable conclusion is that TCB is "play[ing] word games with the concept of a 'right not to be tried.' " *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989).

TCB seeks to create a rationale justifying appeal (where none exists) by recasting the events in the district court as implicating the *res judicata* effect of the district court's conditional order of September 20, 1991 (which order could not have been[27] and is not the subject of this or any other appeal) and as somehow falling within, while still being distinguishable from, the line of cases that is under review by this Court in *Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755 (10th Cir.), *cert. granted*, 114 S. Ct. 379 (1993). These verbal gymnastics do not avail petitioner.

For all the wondrous praises of *res judicata* in TCB's Petition at 12-14, it is still, pedestrianly, only a defense of claim or issue

---

(Cont'd)
pleaded under Fed. R. Civ. P. 8(c), should not be considered "completely separate from the merits." To this extent the second *Coopers & Lybrand* condition is not satisfied.

26. TCB's different formulations of its purported right indicate how slippery the notion is.

27. *See* n. 13 above.

preclusion in a subsequent action. *Blonder-Tongue Lab., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350[28] (1971); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1[29] (1984); Fed. R. Civ. P. 8(c). As such, it, like other affirmative defenses raised during the course of an action, is reviewable on an appeal at the end of the case. *McDonald v. City of West Branch, Michigan*, 466 U.S. 284, 285-87 (1984) (preclusive effect of prior arbitral decision reviewed after verdict for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Board of Regents of Univ. of State*

---

28. *Res judicata* and collateral estoppel are affirmative defenses that must be pleaded. Fed.Rules Civ.Proc. 8(c). The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate.

Id.

29. The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim

(Cont'd)

of New York v. Tomanio, 446 U.S. 478, 482-83 (1980) (limitations defense reviewed after judgment for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Woods v. Rhodes*, 994 F.2d 494, 496 (5th Cir. 1993) (denial of summary judgment based on defense of release reviewed after verdict for plaintiff on a civil rights claim under 42 U.S.C. § 1983); *Micromedia v. Automated Broadcast Controls*, 799 F.2d 230, 231 (5th Cir. 1986) (statute of frauds defense raised in answer and motion for a directed verdict reviewed after verdict for plaintiff on a breach of contract claim). Thus, a denial of claim or issue preclusion (even if the district court's December 22 order could conceivably be so mischaracterized) does not provide a ground for invoking the collateral order doctrine permitting interlocutory appeals.

Nor does *Desktop* require that this Court grant certiorari in this case. TCB's Petition itself at 8-9 distinguishes *Desktop* and at 15 distinguishes *Janneh v. GAF*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990), the case on which it relied below. Consequently, TCB fatally undercuts its argument that, because *Desktop* is pending for decision in this Court, its petition for certiorari purportedly raising similar issues should be granted. In fact, neither *Desktop* nor *Janneh*, which at most involve the rescission or enforcement of settlement agreements, are related in any way to a determination under Securities Exchange Act § 27A of the appropriate limitations period to be applied in reinstating a conditionally dismissed action. Neither case supports the verbal alchemy used by petitioner to transmute a decision on the limitations period applicable in this action into a determination of "a right not to undergo any further litigation."

(Cont'd)

preclusion therefore encompasses the law of merger and bar. See *id.*, Introductory Note before § 24.

Id.

> The critical question, following *Mitchell* [*v. Forsyth*, 472 U.S. 511 (1985)], is whether "the essence" of the claimed right is a right not to stand trial. This question is difficult because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be "irretrievably lost" absent an immediate appeal, litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings before gaining appellate review.

Van Cauwenberghe v. Biard, 486 U.S. 517, 524 (1988) (citations omitted). TCB is no different from any other defendant whose affirmative defense has been rejected on a motion to dismiss. The "essence" of a limitations defense is not "a right not to undergo any further litigation." TCB has no right to an immediate interlocutory appeal in this case.

CONCLUSION

For all the reasons stated above, this Court should deny TCB's petition for a writ of certiorari.

Respectfully submitted,

GREGORY K. ARENSON
Counsel of Record
WENDY M. ZELLER
KAPLAN, KILSHEIMER & FOX
Attorneys for Respondent
685 Third Avenue
New York, New York 10017
(212) 687-1980

Dated: May 6, 1994

No. 93-1583

(3)

Supreme Court, U.S.
FILED
MAY 17 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

TEXAS COMMERCE BANCSHARES, INC.,

Petitioner,

—v.—

STANLEY M. GROSSMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

RICHARD F. ZIEGLER*
DEBORAH M. BUELL
JAMES D. MERRIMAN
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006
(212) 225-2000

Attorneys for Petitioner Texas Commerce Bancshares, Inc.

*Counsel of Record

8 pp

TABLE OF AUTHORITIES

Cases	PAGE
Axel Johnson Inc. v. Arthur Andersen & Co., 6 F.3d 78 (2d Cir. 1993)	3, 4
Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978)	4
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	5
Desktop Direct, Inc. v. Digital Equipment Corp., 992 F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (1994)	1, 2, 4
Janneh v. GAF Corp., 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990)	4
Johann Maria Farina Gegenuber Dem Neumarkt v. Roger & Gallet, 296 F.2d 119 (2d Cir. 1961)	3
Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989)	5
Mitchell v. Forsyth, 472 U.S. 511 (1985)	5
Richardson v. Selsky, 5 F.3d 616 (2d Cir. 1993)	5
Van Cauwenberghe v. Biard, 486 U.S. 517 (1988)	6
Welch v. Cadre Capital, 946 F.2d 185 (2d Cir. 1991)	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1583

TEXAS COMMERCE BANCSHARES, INC.,

Petitioner,

—v.—

STANLEY M. GROSSMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

Petitioner Texas Commerce Bancshares, Inc. ("TCB") respectfully submits this reply brief in support of its petition for a writ of certiorari.[1]

The brief in opposition to TCB's petition filed by Respondent Stanley M. Grossman ("Grossman") fails to rebut TCB's showing that a district court's order reinstating a case previously dismissed with prejudice is subject to immediate appeal under this Court's collateral order doctrine precedents. Similarly, Grossman fails to address TCB's showing that by granting the petition and deciding this case in conjunction with *Desktop Direct, Inc. v. Digital Equipment Corp.*, 992

[1] The statement required by S. Ct. Rule 29.1 appears at Pet. ii.

F.2d 755 (10th Cir. 1993), *cert. granted*, 114 S. Ct. 379 (1994) (argued Feb. 22, 1994), this Court will be able to define precisely the scope of the collateral order doctrine in these circumstances, an issue as to which the courts of appeals need guidance.

1. Instead of confronting the merits of TCB's petition Grossman mischaracterizes it. Grossman argues that the collateral order doctrine is inapplicable since the language of Section 27A of the Securities Exchange Act does not confer on TCB a right not to be tried. Respondent's Brief in Opposition ("Br. Opp.") at 8. This is true but irrelevant, since the issue presented by TCB's petition is wholly independent of Section 27A.

Contrary to Grossman's assertion, the question presented by TCB's petition is whether a decision of a district court rescinding a previous order of dismissal with prejudice is subject to immediate review, where the previous dismissal rendered the claim *res judicata* and the rescission of that order, if wrong, threatens to destroy—irreversibly absent immediate review—the defendant's right not to have to litigate the claim again. Here, the right not to be tried comes not from the District Court's reinstatement order under Section 27A of December 22, 1993, Texas Commerce Bancshares, Inc.'s Petition for a Writ of Certiorari ("Pet.") at 5a, but rather from the District Court's previous order of September 23, 1991, Pet. at 2a, dismissing the claim on the merits, with prejudice, and rendering the claim *res judicata*. The right to immediate appeal is implicated by this case as well as any other case in which a reinstatement order follows a dismissal on the merits with prejudice.[2]

---

[2] Grossman's argument that TCB's petition fails to present an important issue since the number of cases under Section 27A is limited and diminishing, Br. Opp. at 8, is the exact opposite of his argument to the United States Court of Appeals for the Second Circuit. There Grossman expressed the fear that a decision in TCB's favor would open the floodgates and allow an ever expanding number of decisions to be

2. Grossman further mischaracterizes the issue by arguing that TCB's claim to immediate review is "no different" than that of any defendant whose motion to dismiss has been rejected before trial by the trial court. Br. Opp. at 14. Yet TCB's right to immediate appeal arises precisely because the District Court granted its motion to dismiss in its September 23, 1991 order, not because the District Court rejected it. Thus Grossman's description of TCB's procedural posture is incorrect. It is also untrue that TCB's asserted right to avoid trial is premised on a statute of limitations defense. The right to immediate review derives from the principles of *res judicata*, created when the District Court accepted TCB's argument and dismissed Grossman's claim against it. The nature of the defense found meritorious by the District Court is beside the point for this purpose; TCB's petition does not assert that a court's denial of a dismissal motion based on a limitations defense should be immediately appealable.[3]

---

appealed under the collateral order doctrine. Neither of Grossman's contradictory contentions is correct, as noted in TCB's petition at page 15.

[3] Grossman also argues that the District Court's September 23 dismissal order was conditional and therefore not appealable. Br. Opp. at 5 n.13-14, 11 n.27. This contention is misplaced. First, the order of dismissal with prejudice was not subject to a condition precedent, and its provision authorizing reinstatement if the pending appeal in the Second Circuit in *Welch v. Cadre Capital*, 946 F.2d 185 (2d Cir. 1991), was determined against TCB's position was mooted when *Welch* was decided in TCB's favor. *See* Pet. at 5. These circumstances are in direct contrast to the case cited by Respondent, *Johann Maria Farina Gegenuber Dem Neumarkt v. Roger & Gallet*, 296 F.2d 119 (2d Cir. 1961), in which there was a condition precedent to the dismissal order which was not fulfilled.

Second, the appealability of the District Court's September 23 order is irrelevant, since it does not impact its *res judicata* effect. TCB's decision was final for *res judicata* purposes notwithstanding the absence of entry of a separate Rule 58 judgment as noted in *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir. 1993) ("[N]ot all judgments that are final for purposes of *res judicata* are final for Fifth Amendment and separation of powers purposes."). Pet. at 12 n.4; Br. Opp at 6. Because the dismissal with prejudice was final for purposes of *res*

3. Grossman fails to rebut TCB's showing that its petition should be granted to clarify the present uncertainty in the circuits on the scope of the collateral order doctrine. Grossman observes that neither *Desktop Direct* nor *Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990), are "related in any way to a determination under Securities Exchange Act § 27A of the appropriate limitations period to be applied. . . ." Br. Opp. at 13. Yet that contention necessarily relies on the misperception that this petition turns on Section 27A.

Grossman also points to a purported inconsistency in TCB's argument that it is both similar and distinct from *Desktop*. No such inconsistency exists. TCB is similar to *Desktop* in that both involve a defendant's right not to endure the vexatiousness of further litigation where previous circumstances had disposed of the claim against it. TCB is distinct from *Desktop* because its right not to go to trial results from a clear exercise of judicial power rather than the operation of a disputed contractual provision. Further, TCB's claim provides this Court with an enhanced opportunity to define the contours of the collateral order doctrine, since it presents the issue with a clarity lacking in *Desktop*. *See* Pet. at 9.

4. Respondent's reply brief repeatedly mistakes the nature of the collateral order doctrine and misstates the applicable test. Grossman asserts that immediate appeal is unnecessary, because denials of a statute of limitations defense, or a claim

---

judicata, TCB had a right to avoid trial which requires immediate review under the collateral order doctrine.

Moreover, the September 23 order was final for all purposes notwithstanding the lack of entry of a separate judgment because the order expressly incorporated the then-pending and legally identical appeal in the Second Circuit of *Welch*. Grossman received effective and expedited appellate review in the *Welch* decision, rendering the dismissal order final for all purposes under *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). *Cf. Axel Johnson*, 6 F.3d at 84 (order final for *res judicata* but not for constitutional purposes where no separate judgment entered; order at issue did not incorporate outcome of pending appeal).

of unconstitutionality, Br. Opp. at 10, or a defense of *res judicata* are "reviewable on an appeal at the end of the case."[4] *Id.* at 12. Of course that is true, but it proves nothing with respect to the applicability of *Cohen*: denials of the defenses of double jeopardy, qualified immunity and absolute immunity can also be raised on appeal after trial and, if found meritorious by the appellate court, will lead to a reversal of the judgment below. However, under the collateral order doctrine rejections of such defenses are subject to immediate review because the central question is not simply whether a defense may be reviewed after trial but whether the right in question is "*effectively* unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (emphasis supplied) (citations omitted). "The third prong of the *Coopers & Lybrand* test is satisfied only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.' " *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978). Here, TCB's right, based on *res judicata* principles, is a right to avoid trial twice on the same claim. Since that right cannot be effectively vindicated post-trial, review must be immediate.

5. Lastly, Grossman fails to contravene the issue at the heart of TCB's petition: that TCB's right under the doctrine

---

[4] In support Grossman cites a number of cases, none of which discusses the collateral order doctrine, and which taken together stand only for the unexceptional proposition that such defenses have been reviewed upon final judgment. Br. Opp. at 10, 12-13. Grossman also suggests that because a defense of *res judicata* is raised as an affirmative defense under Rule 8(c), Fed. R. Civ. P., the collateral order doctrine is inapplicable. However, as pointed out previously, Pet. at 13 n.5, even those defenses which are indisputably subject to immediate appeal, *e.g.*, qualified immunity (*see Mitchell v. Forsyth*, 472 U.S. 511 (1985) (denial of qualified immunity immediately appealable)), are also pleaded as affirmative defenses under Rule 8(c). *See Richardson v. Selsky*, 5 F.3d 616, 619 (2d Cir. 1993) (claim of qualified immunity pleaded as affirmative defense).

of *res judicata* encompasses the right to avoid the burden of further litigation and is therefore at essence a right not to stand trial. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) ("The critical question . . . is whether 'the essence' of the claimed right is a right not to stand trial."). Although Grossman indulges in the misplaced contention that Section 27A creates no such right, Br. Opp. at 11, he cites no case, treatise or other authority in opposition to the principle that the doctrine of *res judicata* creates just such protection.

* * *

Certiorari should be granted to clarify that a *res judicata* right warrants the protection of the collateral order doctrine and that immediate review is necessary to determine if the reinstatement of a claim previously dismissed on the merits with prejudice is appropriate.

Dated: May 16, 1994

Respectfully submitted,

RICHARD F. ZIEGLER*
DEBORAH M. BUELL
JAMES D. MERRIMAN
CLEARY, GOTTLIEB, STEEN
& HAMILTON
One Liberty Plaza
New York, New York 10006

Attorneys for Petitioner
Texas Commerce Bancshares, Inc.

*Counsel of Record